United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1222

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P/S

To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1222

UNITED STATES OF AMERICA,
Appellee,

—v.—

ALBERT LEVY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Albert Levy appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 30, 1975, after a four day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Indictment S 75 Cr. 310, filed March 25, 1975, charged Levy with bribery (Title 18, United States Code, Section 201(b)) and with unlawfully giving a gratuity to a Revenue Agent of the Internal Revenue Service (Title 18, United States Code, Section 201(f)). Trial commenced on April 7, 1975 and, on April 10, 1975, the jury found Levy guilty of both counts.

On May 30, 1975, Levy was sentenced on the bribery count to six months in prison and to a fine of $5,000, to stand committed until paid, and to a six months concurrent sentence on the gratuity count.

Statement of Facts

The Government's Case

The Government proved at trial that Albert Levy paid a $1,000 bribe to Revenue Agent Anthony Midgette to induce the Revenue Agent to stop the audit of Levy's 1972 Federal income tax return, and to issue a "no change" letter accepting the return as filed.

In or about June 1974, Midgette was assigned to audit Levy's 1972 Federal income tax return (Tr. 19, 23). Levy operated the Guarantee Lock Company on Fulton Street in Manhattan (Tr. 302), a family business which Levy owned for the last four months of 1972. Midgette testified that his supervisor had told Midgette that the return was pulled as a result of information coming to the Internal Revenue Service ("IRS") from Consolidated Edison to the effect that Levy had passed off locks purchased in Portugal as authentic Yale locks which he had sold at a very high profit (Tr. 192-93). It was thus suspected that Levy had underreported his income (Tr. 197). Midgette's supervisor further advised him that the IRS had received information that Levy had attempted to bribe a Consolidated Edison employee and it was possible that money was funneling to Levy through a Mexican bank (Tr. 192).*

On June 6, 1974, Midgette mailed out a form letter to Levy. A meeting ensued on July 16, 1974 between Levy, Midgette and Levy's accountant, Morris Franco. Thereafter, Midgette and Franco met at the IRS office in Brooklyn on July 26, 1974 and August 2, 1974 to go over the audit (Tr. 40).

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* The information concerning the stimulus to the audit of Levy's tax return was elicited by defense counsel on cross-examination.

On August 5, 1974, as a result of a telephone message he had received from Levy (GX 3; Tr. 41-43), Midgette telephoned Levy and was informed that Franco was costing him $75 on each occasion that he met with Midgette and that, in Levy's view, the accountant was not worth that much. Levy asked if could he do anything to help out with the audit. Midgette informed Levy that he needed additional books and records, including sales invoices (Tr. 43).

In the conversation, Midgette informed Levy that, as a result of stock market transactions which Midgette and Franco had analyzed, Levy and his parents had realized a long-term capital gain in the amount of $5,400 (Tr. 43-44), whereas the 1972 Federal income tax returns of Levy and his parents showed an aggregate $4,400 capital loss taken by Levy and his parents.* Levy also told Midgette on the telephone that the reason why the sales figures in the cash receipts journal did not tie into the information set forth on the bank statements was that he had padded the figures in the cash receipts journal. Levy also told Midgette that he had actually rewritten the cash receipts journal and that it was not an original (Tr. 46). Levy asked to meet Midgette at which time he said he would produce sales invoices that would tie into his cash receipts journal (Tr. 47).

On August 8, 1974, Levy met Midgette at the IRS office in Brooklyn. Levy produced some sales invoices and explained how he had padded his cash receipts journal (GX 4; Tr. 48-50). He also stated that the cash receipts journal had been rewritten. In response to this information, Midgette gave Levy a list and asked him to supply certain

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* The income tax returns of Levy and his parents, Isaac and Suzy Levy, were interrelated in that Levy owned and operated Guarantee Lock Company for the last four months of 1972, whereas his parents owned the business for the first eight months although Levy operated the business during the entire year. Moreover, they split their stock market transactions between themselves (Tr. 28-32), *i.e.*, half of the profits on stock market transactions went to Levy and half to his parents.

sales invoices which should have matched checks received by Guarantee Lock Company (GX 5; Tr. 53). Midgette also informed Levy that instead of reporting a $2,200 long-term capital loss on his stock market transactions, a long-term capital gain of $2,600 should have been reported by Levy (Tr. 57-58).

Levy then reached into his pocket, pulled out what he said was $1,000, and offered it to Midgette to stop the audit and to give him a "no change," *i.e.*, to accept his return as filed (Tr. 58-59). Levy then said he was sure Midgette could use the money; in response, Midgette advised Levy that he was getting married soon and he planned a honeymoon (Tr. 59). Levy wanted to give Midgette the money right on the spot in the conference room (Tr. 59). Midgette told Levy he did not want to take the money in the office. Levy then asked Midgette to go outside the building and take the money there; Midgette responded that it would not look right for an agent to go outside with the taxpayer (Tr. 59). Undaunted, Levy asked Midgette where the rest room was, removed some lined paper from Midgette's desk and went into the rest room (Tr. 59). A few minutes later Levy returned, placed the lined paper folded on the desk, and stated that inside the lined paper was $1,000. Midgette once again refused to take the money in the office (Tr. 59). Levy asked Midgette to meet with him later, and Midgette said he could meet Levy at a Chinese restaurant on Van Siclen Avenue in Brooklyn at six o'clock that evening (Tr. 59).

Promptly thereafter, Midgette contacted IRS's Inspection Service (Tr. 61). That afternoon at around 3:00 P.M., Midgette telephoned Levy (Tr. 62). The conversation was tape recorded. In the course of the conversation, Levy asked Midgette if everything is "alright the way we said before?" (GX 6AA, p. 1). Midgette then inquired of Levy if Levy wanted this done for no tax effect and to stop the audit. Levy stated that that was what he wanted and that

he couldn't dispute the stock market transactions. The meeting place was changed to Stark's Chop House, on Broadway between Duane and Worth Streets, in Manhattan at 7:15 P.M. (GX 6AA; Tr. 61-63).

At around 7:00 P.M., Levy and Midgette met at Stark's Chop House. In the course of the meeting, which was recorded, Levy told Midgette that if someone paid him in cash, he did not put it down in the ledger but rather put it into his pocket (GX 7AA, p. 5; Tr. 73, 409). Levy informed Midgette that nobody was "hitting the till" but him (Tr. 411). Levy advised Midgette that if anything happened:

> "I'm gonna swear up and down. I'm gonna deny it today and tomorrow and you say the same thing" (GX 7AA, p. 13; Tr. 420).

At the final stages of the dinner, Levy took out ten $100 bills wrapped in the same lined paper he had obtained at Midgette's office and gave the money to Midgette.

Inspector Donald St. Sure testified that at about 10:00 A.M., on August 20, 1974, Levy was arrested, advised of his *Miranda* warnings and made a false exculpatory statement to the effect that he did not pay any money to Revenue Agent Midgette to influence the outcome of the audit (Tr. 281).

Thereafter, on August 20, 1974, Levy was brought to the United States Attorney's Office and afforded his *Miranda* rights. At that time, he stated that he had offered and paid Revenue Agent Midgette $1,000 to stop the audit, that it was Levy's idea to offer the money to Midgette, and that Midgette had not solicited or asked for the money in any way (Tr. 283).

The Defense Case

Levy testified in his own behalf. He stated that on the morning of August 8, 1974, he asked Midgette how much he owed on the stock market transactions; that Midgette

replied about $1,000; and that Levy said "I want to settle the case for $1,000" (Tr. 360).* According to Levy, Midgette then asked if Levy wanted this done for "no-effect tax, $1,000" and Levy said "even." According to Levy, he wanted to pay Midgette at that time with a check (Tr. 360). Midgette said he wanted to go over his figures and told him to "bring cash" to their evening meeting. Levy admitted to paying $1,000 cash to Midgette at Stark's Chop House on the evening of August 8, 1974 (Tr. 368). On cross-examination, Levy confirmed that the transcripts (GX 6AA and 7AA) of the August 8, 1974 afternoon telephone conversation and evening meeting at Stark's Chop House accurately reflected his conversation with Midgette (Tr. 372-373).** Levy also testified that in the evening he passed ten $100 bills to Midgette at Stark's (Tr. 368).

Levy testified that Midgette told him to bring cash to their evening meeting and that it was a "hairline question" whether he thought the money was for Midgette or for the United States Government (Tr. 390). Levy also testified that Midgette, upon receiving the $1,000, had told Levy that "it will be nice for a while" and that he was going to take a honeymoon in the Caribbean or Hawaii (Tr. 399-400). He also admitted telling Midgette that the books had been rewritten (Tr. 403).*** Levy further testified that

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* Midgette had testified that at no time had he ever told Levy his aggregate tax liability or his additional tax liability in connection with the audit examination of Levy's 1972 return (Tr. 233).

** Contrary to Midgette's testimony, Levy testified that the first time he obtained the $1,000 in cash was when he went to the bank after conferring with Midgette at around three o'clock in the afternoon (Tr. 365).

*** Levy acknowledged that he told Midgette, at their meeting at Stark's, that when he next received the cash receipts journal he would block out an additional number from the books (Tr. 409).

he told Midgette that he was receiving additional income that was not reflected in the cash receipts journal, and that when he was paid in cash it did not go into the ledger (Tr. 409).

Although Levy admitted that he made a statement to the effect that he had given Midgette $1,000, Levy denied making any further statements in the United States Attorney's Office (Tr. 413-415).

ARGUMENT

Levy's contention that the entrapment defense was made out as a matter of law is utterly without merit.

Levy claims on appeal that the District Court erred in sending the entrapment issue to the jury and that the Court should have dismissed the Indictment as a matter of law on this ground. The argument is without any merit whatever.

First of all, Levy's claim that the Indictment should have been dismissed on the ground of entrapment as a matter of law was waived by his failure to raise it below (Tr. 300, 423-424, 429-431a). *United States* v. *Croxton*, 482 F.2d 231, 233-234 (9th Cir. 1973). See also *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); cf. *United States* v. *Frank*, Dkt. No. 74-2639 (2d Cir., June 27, 1975), slip op. at p. 4444; *United States* v. *Edwards*, 366 F.2d 853, 867-868 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967). Indeed, it is of some note that Levy did not even mention the defense of entrapment in his opening (Tr. 8-16).*

* At that stage of the proceedings the defense apparently was that Levy had paid Midgette the $1,000 in cash during an evening dinner at Stark's Chop House in the good faith belief that he was paying the additional tax due on his 1972 income.

However, even assuming *arguendo* that the claim was preserved at the proceedings below, from a review of this record, it is clear beyond any doubt that Levy was not entitled to dismissal on the grounds of entrapment. This is most clearly demonstrated by the fact that Levy was probably not even entitled to the jury instruction on entrapment which Judge Ward gave (Tr. 499-502), at the request of defense counsel (Tr. 423, 429-431a). As Levy concedes, the instruction was properly set forth (Brief at 11).

Under the traditional bifurcated entrapment test, formulated by the Supreme Court and this Circuit, two separate factual issues require resolution when the issue is put to the jury: "(1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it." *United States* v. *Sherman*, 200 F.2d 880, 882-883 (2d Cir. 1952, L. Hand, C. J.); *United States* v. *Russell*, 411 U.S. 423 (1973); *Sorrells* v. *United States*, 287 U.S. 435 (1932); *United States* v. *Rosner*, 485 F.2d 1213, 1221-1222 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Braver*, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *United States* v. *Greenberg*, 444 F.2d 369 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Viviano*, 437 F.2d 295 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971). The showing a defendant must make of inducement, however slight, must be of "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged." *United States* v. *Sherman*, *supra*, 200 F.2d at 883; *United States* v. *Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970). The evidence that is relied upon by Levy to meet his burden of inducement is (1) that his audit was commenced as a result of a report to the IRS by Consolidated Edison that Levy had attempted to bribe one of its

employees and probably had unreported income arising from a fraud Levy had perpetrated on Consolidated Edison;* and (2) that the audit that Levy attempted to abort with his bribe offer was a thorough one (Brief at 12-13). This quite clearly cannot meet the defendant's burden of making out inducement under *Sherman* and *Henry*. See also *United States* v. *Miley*, 513 F.2d 1191, 1202 (2d Cir. 1975); *United States* v. *Berry*, 362 F.2d 756, 758 (2d Cir. 1966).**

Moreover, it is well recognized that the entrapment issue need not be put to the jury, even when the defendant has made out inducement, if there is uncontradicted evidence of the defendant's predisposition. *United States* v. *Miley*, *supra*, 513 F.2d at 1202; *United States* v. *Nieves*, 451 F.2d 836, 838 (2d Cir. 1971); *United States* v. *Greenberg*, 444 F.2d 369, 371 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971). Here the record contains substantial uncontradicted evidence of Levy's predisposition to commit the crime charged. Quite apart from those portions of Midgette's testimony, contested

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* The IRS had received information that Levy was deriving unreported high profits on the sale of Portuguese locks as authentic yale locks (Tr. 192-194). There are numerous occasions when the IRS relies on information received from the public when undertaking to commence its revenue collecting functions. It is hard to fathom how receipt of such information by IRS and its subsequent use in the normal manner can conceivably constitute a complete defense as a matter of law to a bribery charge.

** The facts before the jury hardly indicate inducement of any kind. Midgette was content to conduct the audit with Franco, as he did on July 26, 1974 and August 2, 1974. Thereafter, Levy telephoned Midgette at the IRS office (GX 3), and, in their telephone conversation of August 5, 1974, requested to meet with Midgette on August 8, 1974, at which time Levy brought the $1,000 cash with him to the IRS office (Tr. 47, 58-59). On August 20, 1974, at the United States Attorney's Office, Levy admitted that he had offered and paid Revenue Agent Midgette $1,000 to stop the audit, that it was Levy's idea to offer the money to Midgette, and that Midgette had not solicited or asked for the money in any way (Tr. 283).

by Levy, Levy admitted that he had told Midgette that he doctored his company's books (Tr. 402-404), that he would do so in the future (Tr. 409), and that he pocketed cash payments to his company, rather than recording them on the books (Tr. 409). He admitted overcharging his customer in the tape recorded conversation at Stark's (GX 7AA, p. 10), and "hitting the till" (Tr. 410). In addition, defense counsel brought out that information from Consolidated Edison indicated that Levy had tried to bribe a Consolidated Edison employee and had probably derived unreported income on Portuguese locks which Levy had sold as authentic Yale locks (Tr. 192-194).* Indeed, Levy's predisposition and planning were so advanced that, when he paid the $1,000 bribe in cash at Stark's Chop House on the evening of August 8, 1974, he told Midgette:

> "No one knows. Listen, if anything happens I'll tell you right now I'm gonna swear up and down. I'm going to deny it today and tomorrow and you say the same thing." (GX 7AA, p. 13; Tr. 420).**

In *United States* v. *Mascia*, 447 F.2d 1111, 1113 (2d Cir. 1971), this Court held that evidence of defendant's willingness to falsify his tax returns was sufficient to permit the jury to infer defendant's willingness and predisposition to bribe a revenue agent. Here, on tape, Levy acknowledged the falsification of his books and his willingness to do so in the future. He admitted that when he received cash, he was putting it into his pocket but not entering it into the ledger. Moreover, in the August 5, 1974 telephone

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* This evidence, while hearsay, is admissible to show predisposition. *United States* v. *Moriarty*, 497 F.2d 486, 488 (5th Cir. 1974); *United States* v. *Brooks*, 477 F.2d 453 (5th Cir.), *cert. denied*, 414 U.S. 1075 (1973).

** This is precisely the course that Levy had followed when he met Inspection Service on the morning of August 20, 1974 and stated that he had never paid any money to Revenue Agent Midgette to influence the outcome of an audit (Tr. 281). Moreover, Levy's trial testimony was highly evasive, to say the least.

conversation with Midgette, Levy stated that he had rewritten the cash receipts journal. Levy's statements on tape also make clear his willingness to commit perjury and a direction to Midgette to do likewise if this were necessary to avoid detection (GX 7AA, p. 13; Tr. 429). The unrebutted evidence of predisposition here is clearly sufficient under *Mascia* to sustain the jury's verdict, if not to foreclose the entrapment issue entirely from submission to the jury.

Of course, in addition to the unrebutted proof of predisposition, the jury had before it the testimony of Midgette, which was far more credible than Levy's and indeed only partly contested by Levy. Midgette testified that, after revealing his various crude forms of tax evasion, Levy had pressed a thousand-dollar cash bribe upon him. In addition, after highly incriminating tape recorded conversations with Midgette, Levy handed Midgette $1,000 in cash during the evening at a downtown bar and grill, an activity which Levy variously and hesitatingly explained at trial was at best intended to satisfy his tax liability and at worst understood by him to be a bribe. Finally, of course, the jury had before it Levy's post-arrest admission, following an earlier false exculpatory statement, that he had intended to bribe Midgette, that the bribe had been his own idea, and that Midgette had not asked him for any money. To argue, on this record, that Levy was entrapped as a matter of law is frivolous, as *United States* v. *Mascia, supra,* 447 F.2d at 1114, makes clear. In *United States* v. *Rosner, supra,* 485 F.2d at 1222, this Court rejected a like claim holding:

> "There is not enough credible evidence, without the testimony of the appellant himself, to sustain the defense of entrapment. The trial court need not accept the defendant's version as true or take the question of his credibility from the jury. 'The truth of the matter was for the jury to determine' (citations omitted)."

Here, even accepting Levy's testimony as truthful, there was not enough credible evidence to sustain the defense of entrapment, and Judge Ward was very fair to Levy in even putting his entrapment claim to the jury. In the final analysis, the claim of entrapment as a matter of law is without any merit since the IRS audit procedures here followed were in no sense so shocking or so outrageous "that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Cuomo*, 479 F.2d 688, 692 (2d Cir. 1973); *United States* v. *Russell, supra*, 411 U.S. at 432.*

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* The cases upon which Levy purports to rely (Br. 13-14) fall wide of the mark. In *United States* v. *Braver*, 450 F.2d 799 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972) and *United States* v. *Viviano*, 437 F.2d 295, 299 n. 4 (2d Cir. 1971), this Court recognized that *Kadis* v. *United States*, 373 F.2d 370 (1st Cir. 1967), on which Levy relies, means only that extreme police tactics, such as badgering or massive appeals to the sympathy of an obviously reluctant person, can indicate that the Government will not have sustained its burden. Here, there was no badgering and no massive appeals of any kind; rather, Levy offered the $1,000 bribe and practically foisted it on Midgette on the very first occasion that the two men had met alone. Even assuming *arguendo* its continuing validity in light of *United States* v. *Russell, supra*, *United States* v. *Mathues*, 22 F.2d 979 (E.D. Pa. 1927), involved a situation where the Government had insisted upon dealing with the defendant after a bribe had been offered by the defendant's brother. There was no evidence whatsoever of the defendant's predisposition. Here, the bribe was first offered by Levy to Midgette, at a meeting held at Levy's request, and there was a plethora of predisposition evidence to support the jury's rejection of the entrapment defense.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEVEN A. SCHATTEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of August, 1975 he served a copy of the within Brief for the United States of America by placing the same in a properly postpaid franked envelope addressed:

Neal J. Hurwitz, Esq.
745 Fifth Avenue
New York, New York 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in front of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Steven A. Schatten

STEVEN A. SCHATTEN

Sworn to before me this

14th day of August, 1975.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977